Internal Revenue Service

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Department of the Treasury
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December 05, 2011

Legend

P	=	
S1	=	
S2	=	
S3	=	
S4	=	
S5	=	
S6	=	
S7	=	
Date1	=	
Date2	=	
Year1	=	
Year2	=	
State1	=	
State2	=	

Dear :

This letter responds to a letter dated June 29, 2011, and supplemental correspondence, submitted by P on behalf of itself and S1, S2, S3, S4, S5, S6, and S7 (hereinafter P, S1, S2, S3, S4, S5, S6, and S7 will be collectively referred to as Taxpayer), requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the following elections: the election to use the alternative depreciation system (ADS) under § 168(g)(7) of the Internal Revenue Code for all property placed in service by Taxpayer in the taxable year ending on Date1; and the election not to deduct additional first year depreciation under § 168(k)(2)(D)(iii) for all classes of qualified property placed in service by Taxpayer in the taxable year ending

on Date1. P is also requesting on behalf of S6 an extension of time pursuant to § 301.9100-3 to make an election under § 59(e)(1) to deduct intangible drilling costs ratably over a 60-month period and deduct exploration costs ratably over a 10-year period.

FACTS

Taxpayer represents that the facts are as follows:

P is the common parent of an affiliated group of corporations that includes S1, S2, S3, S4, S5, S6, and S7, and that files a consolidated federal income tax return. P is a public company that is incorporated in State1 and maintains its principal executive offices in State2. Taxpayer uses an overall accrual method of accounting.

Taxpayer engages in two lines of business. Taxpayer develops, builds, owns, and operates geothermal power plants and recovered energy-based power plants worldwide. Taxpayer also designs and sells equipment, and provides services related to engineering, procurement, construction, operation, and maintenance of geothermal and recovered energy power plants.

For the taxable year ending on Date1, Taxpayer planned to make the election under § 168(g)(7) to use the ADS for all tangible depreciable property, and to make the election under § 168(k) not to deduct the additional first year depreciation for all classes of qualified property, placed in service by Taxpayer in that taxable year. S6 also planned to make an election under § 59(e) for the taxable year ending on Date1, to amortize its intangible drilling costs ratably over a 60-month period and to amortize its exploration costs ratably over a 10-year period.

Taxpayer engaged an outside tax consulting firm to prepare its Form 1120, U.S. Corporation Income Tax Return, for several taxable years prior to Year1, but began transitioning this work to its tax manager in Year1. Taxpayer's tax manager prepared and timely filed the Year1 Form 1120. Beginning in Year2 and before the due date (without extensions) of Taxpayer's consolidated federal income tax return for the taxable year ending on Date1, Taxpayer's tax manager took on additional financial statement, property tax, and SEC compliance responsibilities in addition to tax accounting responsibilities. As a result of the tax manager's increased workload, Taxpayer failed to timely file a request for an extension to file its consolidated federal income tax return for the taxable year ending on Date1. Accordingly, Taxpayer did not timely file such consolidated federal income tax return. As of Date2, Taxpayer has not filed its consolidated federal income tax return for the taxable year ending on Date1.

RULING REQUESTED

Taxpayer requests an extension of time pursuant to § 301.9100-3 to make the elections under § 168(k) not to deduct the additional first year depreciation with respect to all classes of qualified property placed in service by Taxpayer in the taxable year

ending on Date1, and under § 168(g)(7) to use the ADS for all tangible depreciable property placed in service by Taxpayer in the taxable year ending on Date1. P also requests, on behalf of S6, an extension of time pursuant to § 301.9100-3 to make an election under § 59(e) for the taxable year ending on Date1 to amortize intangible drilling costs ratably over a 60-month period and exploration costs ratably over a 10-year period.

LAW AND ANALYSIS

Section 167(a) provides that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the taxpayer's trade or business.

The depreciation deduction provided by § 167(a) for tangible property placed in service after 1986 generally is determined under § 168. Section 168 prescribes two methods of accounting for determining depreciation allowances. One method is the general depreciation system in § 168(a), and the other method is the alternative depreciation system in § 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

Section 168(g)(7) permits a taxpayer to elect for any class of property for any taxable year to use the ADS for determining depreciation for all property in that class placed in service during that taxable year. However, in the case of nonresidential real property, the election is made separately with respect to each property. Once made, the election to use ADS is irrevocable.

Section 301.9100-7(T)(a)(1) provides that the election under § 168(g)(7) must be made for the taxable year in which the property is placed in service. Section 301.9100-7T(a)(2)(i) further provides that this election must be made by the due date (including extensions) of the tax return for the taxable year for which the election is to be effective. Section 301.9100-7T(a)(3)(i) provides that the election under § 168(g)(7) is made by attaching a statement to the tax return for the taxable year for which the election is to be effective.

Section 168(k)(1) (as amended by the Small Business Jobs Act of 2010, Pub. L. 111-240, 124 Stat. 2504 (September 27, 2010) (SBJA) provides a 50-percent additional first year depreciation deduction for qualified property acquired by a taxpayer after 2007 and placed in service by the taxpayer before 2011 (or before 2012, in the case of property described in § 168(k)(2)(B) and (C)).

Section 168(k)(2)(D)(iii) provides that a taxpayer may elect not to deduct the 50-percent additional first year depreciation for any class of property placed in service during the taxable year. The term “class of property” is defined in § 1.168(k)-1(e)(2) of the Income Tax Regulations as meaning, in general, each class of property described in § 168(e) (for example, 5-year property).

Section 1.168(k)-1(e)(3)(i) provides that the election not to deduct additional first year depreciation must be made by the due date (including extensions) of the federal tax return for the taxable year in which the property is placed in service by the taxpayer.

Section 1.168(k)-1(e)(3)(ii) provides that the election not to deduct additional first year depreciation must be made in the manner prescribed on Form 4562, "Depreciation and Amortization," and its instructions. The instructions to Form 4562 for the taxable year ended Date 1 provided that the election not to deduct the additional first year depreciation is made by attaching a statement to the taxpayer's timely filed tax return (including extension) indicating that the taxpayer is electing not to deduct the additional first year depreciation and the class of property for which the taxpayer is making the election. Section 1.168(k)-1(e)(3)(ii) further provides that the election is made separately by each person owning qualified property (for example, for each member of a consolidated group by the common parent of the group, by the partnership, or by the S corporation).

Section 59(e)(1) generally allows a taxpayer to deduct any qualified expenditure ratably over the 10 year period beginning with the taxable year in which the expenditure was made or, in the case of intangible drilling and development expenditures, to deduct the expenditure ratably over the 60 month period beginning with the month in which the expenditure was paid or incurred.

Section 59(e)(2) includes in the definition of “qualified expenditure” any amount, which but for an election under § 59(e), would have been allowable as a deduction (determined without regard to § 291) for the taxable year in which paid or incurred under § 263(c) (relating to intangible drilling and development expenditures) and § 617(a) (relating to mining exploration expenditures).

Section 59(e)(3) specifically prohibits a taxpayer from deducting under any other section of the Code any qualified expenditure to which an election under § 59(e) applies. Section 59(e)(4)(A) allows a taxpayer to make an election under § 59(e)(1) for any portion of any qualified expenditure.

Section 1.59-1(b)(1) prescribes the time and manner of making a § 59(e)(1) election. According to § 1.59-1(b)(1), an election under § 59(e) shall only be made by attaching a statement to the taxpayer's income tax return (or amended return) for the taxable year in which the amortization of the qualified expenditures subject to the § 59(e) election begins. The taxpayer must file the statement no later than the date prescribed by law for filing the taxpayer's original income tax return (including any extensions of time) for the taxable year in which the amortization of the qualified expenditures subject to the § 59(e) election begins.

Section 263(c) allows a taxpayer to elect, under regulations prescribed by the Secretary, to deduct intangible drilling and development costs (IDC) in the case of oil and gas and geothermal wells. The regulations relating to the election to deduct IDC for

geothermal wells appear under § 1.612-5. Under § 1.612-5(d), the taxpayer may exercise the election by claiming IDC as a deduction on the taxpayer's original or amended return for the first taxable year ending on or after October 1, 1978, in which the taxpayer pays or incurs IDC with respect to a geothermal well commenced on or after that date. No formal statement is necessary. The taxpayer may revoke the election by filing an amended return that does not claim the deduction. If the taxpayer fails to deduct the IDC, the taxpayer is deemed to have elected to recover the costs through depletion to the extent that they are not represented by physical property, and through depreciation to the extent that they are represented by physical property. Upon expiration of the time for filing a claim for credit or refund of any tax imposed by Chapter 1 of the Code with respect to the first taxable year ending on or after October 1, 1978, in which the taxpayer pays or incurs IDC with respect to a geothermal well commenced on or after that date, the taxpayer is bound by the taxpayer’s election to expense the IDC or the deemed election to recover the IDC through depletion or depreciation for that year and all subsequent years.

Section 613(a) provides that in the case of the mines, wells, and other natural deposits listed in § 613(b), the allowance for depletion under § 611 shall be the percentage, specified in § 613(b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowances for depletion and without the deduction under §199).

Section 613(e)(1) provides that for purposes of § 613(a) geothermal deposits located in the United States or in a possession of the United States are treated as listed in § 613(b) and 15 percent is deemed to be the percentage specified in § 613(b). Section 613(e)(2) further provides that a geothermal deposit shall in no case be treated as a gas well for purposes of § 613 or § 613A, and § 613 shall not apply to a geothermal deposit that is located outside the United States or its possessions.

Section 617(a) allows a taxpayer an election to deduct expenditures paid or incurred during the taxable year for the purpose of ascertaining the existence, location, extent, or quality of any deposit of ore or other mineral, and paid or incurred before the beginning of the development stage of the mine. Section 617(a) further provides that in no case shall this subsection apply with respect to amounts paid or incurred for the purpose of ascertaining the existence, location, extent, or quality of any deposit of oil or gas or of any mineral with respect to which a deduction for percentage depletion is not allowable under § 613.

Section 617(b) requires recapture of expenditures deducted under § 617(a) in any taxable year in which any mine with respect to which the expenditures were deducted reaches the producing stage.

Section 1.617-1(c)(1) provides that a taxpayer may exercise the election to deduct exploration expenditures by deducting the expenditures either in the taxpayer's

return for such taxable year or in an amended return filed before the expiration of the period for filing a claim for credit or refund of income tax for such taxable year. Section 1.617-1(c)(1)(ii) requires a taxpayer who makes an election to deduct the expenditures to state clearly on the taxpayer's income tax return for each taxable year for which the taxpayer deducts exploration expenditures the amount of the deduction claimed under § 617(a) with respect to each property or mine.

Section 1.617-1(2) provides that the election under § 617 may be made at any time before the expiration of the period prescribed for filing a claim for refund of the tax imposed by chapter 1 for the first taxable year for which the taxpayer desires to deduct exploration expenditures under § 617.

Under § 301.9100-1, the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

CONCLUSION

Based solely on the facts and representations submitted, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied. Accordingly, Taxpayer is granted 60 calendar days from the date of this letter to make the election under § 168(k)(2)(D)(iii) not to deduct the additional first year depreciation for all classes of qualified property placed in service by Taxpayer during the taxable year ending on Date1, and the election under § 168(g)(7) to use the ADS for determining depreciation for all tangible depreciable property placed in service by Taxpayer during the taxable year ending on Date1. Further, S6 is granted 60 calendar days from the date of this letter to make the election under § 59(e) for the taxable year ending on Date1.

These elections must be made by P filing its original consolidated federal income tax return for the taxable year ending on Date1, with the statements required to make the elections under §§ 59(e), 168(g)(7), and 168(k)(2)(D)(iii). However, if P has filed the consolidated federal income tax return for the taxable year ending on Date1 before the date of this letter, the elections must be made by P filing an amended consolidated federal income tax return for the taxable year ending on Date1.

This letter ruling does not grant an extension of time for filing Taxpayer's consolidated federal income tax return for the taxable year ending on Date1.

Except as specifically set forth above, we express or imply no opinion concerning the federal income tax consequences of any aspect of the transaction or items discussed or referenced above under any other provision of the Code (including other subsections of §§ 59 and 168). Specifically, no opinion is expressed or implied on whether any item of depreciable property placed in service by Taxpayer in the taxable year ending on Date1 is eligible for the additional first year depreciation deduction under § 168(k) or is required to use the ADS pursuant to § 168(g)(1)(A)-(D). We also express or imply no opinion concerning: (1) whether the costs for which S6 seeks to make a § 59(e) election qualify as IDC under § 263(c) and the regulations thereunder or as exploration expenses under § 617 and the regulations thereunder; (2) whether S6 properly elected under § 263(c) and the regulations thereunder to deduct IDC; (3) whether S6 properly elected under § 617(a) and the regulations thereunder to deduct exploration expenses; or (4) whether any portion of the expenses S6 treated as exploration expenses under § 617(a) were subject to recapture under § 617(b) during or before the taxable year ending on Date1.

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

This letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Kathleen Reed

Kathleen Reed
Branch Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2):
Copy of this letter
Copy for section 6110 purposes